In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1458

CHARLES V. CLEMENT, JR. AND
BARBARA G. CLEMENT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 19-23) is unofficially reported at 30 A.F.T.R. 2d 5163. The opinion of the court of appeals (Pet. App. 27-35) is reported at 472 F. 2d 776.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1973. (Pet. App. 27.) The petition for a writ of certiorari was filed on April 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's 1964 income tax return constituted a claim for refund as required by Section 7422 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

Sections 6402 and 7422(a) of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, p. 8-9. Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6402-2(b) and (c) and Section 301.6402-3(b) are set forth in the Appendix, *infra*, pp. 9-10, 10-11.

STATEMENT

On January 20, 1965, the Internal Revenue Service sent petitioner[1] an agent's examination report proposing tax deficiencies for the years 1959 through 1962 in the amount of $35,381.13. On January 29, 1965, a formal notice of deficiency with respect to these years was sent to petitioner advising him that the deficiencies would be assessed upon the expiration of 90 days unless petitioner either filed a petition in the Tax Court or agreed to an earlier assessment, neither of which petitioner did. (Pet. App. 28.)

On April 14, 1965, petitioner filed an income tax return for the tax year 1964 on which he reported on lines 12 and 16, as "Tax" and "Total Tax," the sum of $22,423.47.[2] Petitioner listed withholdings (line 17a) of $14,856.24, leaving a "Balance Due" (line 18) of $7,567.23, which petitioner paid by a check accompanying the return. (Pet. App. 28-29.) Petitioner claimed no

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[1] Petitioner Barbara G. Clement is a party hereto solely as a result of her filing a joint return with her husband.

[2] Petitioner attached to his return a single page schedule in which he listed his total wage and income withholding records

overpayment on line 19 of the return, nor did he request that any overpayment be credited to his 1965 estimated tax or be refunded to him as provided for on lines 20 and 21, respectively. The $22,423.47 shown as the "Total Tax" on line 16 of the return was entered on the assessment rolls as petitioner's self-assessed tax for 1964. (R. 11.)[3]

On June 13, 1967, the revenue agent's report was sent to petitioner proposing deficiencies for 1963 and 1965 and showing a tax liability for 1964 in the amount of $20,875.86 and a resulting overpayment of $1,547.61 for the latter year. On December 29, 1969, notice of the 1964 overassessment was sent to petitioner, advising him that the overassessment was not finally determined and that he should file a claim for refund to protect the overassessment from the expiration of the statute of limitations. On April 22, 1970, the Internal Revenue Service notified petitioner that its records indicated that no claim for refund had been filed, and that it was closing the case on the basis of no overassessment. (Pet. App. 29-30.)

Petitioner brought suit in the district court on April 15, 1971, seeking the refund of $22,406.05 as taxes

for 1964, in addition to the following notation (Pet. App. 29):

Net Deficiency Per R.A.R. dated January 20, 1965	$35,381.13
Tax on amount in line 11.d, Page 1 of this Return	17.42
Total Liability	$35,398.55
Net Overassessment Per R.A.R. dated January 20,1965	$12,975.08
Amount of Tax	$22,423.47

[3] "R." references are to the record on appeal in the court of appeals.

unlawfully assessed and collected and alleging that his 1964 income tax return constituted a claim for refund. (Pet. App. 21-22.) The district court held that the tax return was an implied Section 7422(a) claim for refund, but also ruled that the June 13, 1967 letter constituted a disallowance of $20,875.86 of the implied claim for refund and that petitioner's suit was untimely as to that amount under the two-year statute of limitations contained in Section 6532(a)(1) of the Code. The district court granted judgment to petitioner in the amount of $1,547.61. (Pet. App. 22-23, 24-25, 31.) Both parties appealed. (Pet. App. 31.) The court of appeals reversed the district court, holding that petitioner's 1964 tax return did not constitute either a formal or informal claim for refund and that, accordingly, Section 7422(a) barred petitioner from filing a suit for refund. (Pet. App. 34-35.)

ARGUMENT

1. The decision below is correct. There is no conflict or any other reason for review.

Section 7422(a) of the Code, Appendix, *infra*, categorically requires that no suit may be maintained for the recovery of any internal revenue tax alleged to have been "erroneously or illegally assessed or collected" or "any sum * * * wrongfully collected" until a claim for refund or credit has been filed. We may assume for our purposes here, as did the court of appeals (Pet. App. 31), that petitioner did not actually self-assess a tax in the amount of $22,423.47 for 1964 and that the appropriate procedure would have been for the Service to assess the tax after sending petitioner a notice of deficiency. Nevertheless, the court of appeals properly rejected (Pet. App. 31) petitioner's contention that, on account of this alleged procedural irregularity, he may sue for a refund without first filing a claim for refund. Section 7422(a) requires

a claim for refund in all cases in which taxes are alleged to have been collected "erroneously or illegally"—whether the error be substantive or procedural. Petitioner's argument is not aided by his numerous citations (Pet. 9-10), since these cases, while affirming the need for following the statutory deficiency procedures, do not involve situations where the tax has already been paid. In this case the tax had already been paid, even if erroneously, and thus petitioner's only recourse was to file a claim for refund and sue in the district court. See *Flora* v. *United States,* 362 U.S. 145, 163.

2. Assuming that taxpayer was required to file a claim for refund or credit, his tax return did not, as he contends (Pet. 13-16), satisfy the requirements of an informal claim for refund or credit. The courts have set forth two prerequisites for determining whether a document constitutes an informal claim for refund: First, the document must advise the Commissioner that it is intended to constitute a claim for refund, and secondly, the document must state sufficient facts to apprise the Commissioner of the nature of the claim and the legal grounds on which it is based. *United States* v. *Kales,* 314 U.S. 186, 194-197; *Angelus Milling Co.* v. *Commissioner,* 325 U.S. 293, 297-299;[4] *United States* v. *Felt & Tarrant Co.,* 283 U.S. 269, 272.

In the instant case, the first of these requirements was plainly not satisfied. The return itself nowhere

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[4] Contrary to petitioner's assertion (Pet. 11), the decision of the court of appeals does not conflict with, but is supported by, this Court's decision in *Angelus Milling Co.* v. *Commissioner, supra.* This Court stated in that case that the Commissioner may demand that information be presented in a particular form so that he may be expeditiously and accurately advised of the true nature of the taxpayer's claim, and the facts pertinent thereto.

indicated that petitioner sought a refund, and in fact, petitioner remitted an additional $7,567.23 with the return as the balance necessary to pay the total tax of $22,423.47 shown to be due by both the return and the attached schedule. Nor did the return satisfy the second prerequisite by setting forth facts and legal grounds underlying the claim for refund. The legal basis for petitioner's claim is that the Commissioner erred in failing either to credit the alleged overpayment shown on his return to prior years' tax liabilities, or to refund the overpayments to him. These alleged errors occurred after the return was filed, however, and thus could not have constituted the legal grounds for refund in the return itself. Moreover, even after petitioner was later advised that the government had treated his payments as overpayments and that he should file a claim for refund, he failed to take the required step of either amending his tax return or filing a separate claim for refund. Cf. *United States* v. *Kales, supra,* pp. 193-194;[5] *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62, 72; *United States* v. *Felt & Tarrant Co., supra.*

3. Petitioner's tax return also did not constitute a claim for refund or credit under the special conditions authorized by Section 6402 of the Code, Appendix, *infra,* and set forth in the accompanying Regulations. The tax return concededly did not constitute a Form 843 and did not set forth the legal grounds for refund

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[5] Contrary to petitioner's assertion (Pet. 11), this Court's decision in *United States* v. *Kales, supra,* supports the decision below by placing upon petitioner the burden of perfecting or amending his alleged claim for refund so that it properly advises the Commissioner of the facts and grounds on which the petitioner's claim is founded. See also *Angelus Milling Co.* v. *Commissioner, supra,* pp. 297-299.

or credit, as required by Section 301.6402-2(b) and (c of the Treasury Regulations on Procedure and Administration (1954 Code), Appendix, *infra*. The return also did not constitute a claim for refund under Section 301.6402-3(b), Appendix, *infra*, since as already explained above, it did not contain a "statement * * * setting forth the amount determined as an overpayment and advising * * * [that] such amount shall be refunded to the taxpayer." Finally, the return did not constitute a claim for credit, since Section 301.6402-3(b) allows a credit to be applied only "against the taxpayer's estimated income tax for the taxable year immediately *succeeding* the taxable year for which such return is filed." (Emphasis added.) Petitioner virtually concedes (Pet. 13) that his return did not satisfy this last requirement, since (if anything) it requested application of a credit to prior years' tax liabilities.

4. The decision below does not conflict with *Rosenman* v. *United States*, 323 U.S. 658. That case involved the pre-payment of estate tax placed in an escrow or suspense account so as to prevent the accumulation of interest and penalties prior to the filing of the estate tax return and the subsequent determination of the estate tax liability. Rather than holding that a claim for refund was unnecessary, that case merely held that the limitations period for filing a claim for refund began only when the funds were applied to the tax liability. Similarly there is no conflict with *Stuart* v. *Chinese Chamber of Commerce of Phoenix*, 168 F. 2d 709 (C.A. 9), which merely stated that a non-taxpayer need not file a claim for refund of his own funds which were seized and applied against the tax liability of another taxpayer. Here there is no contention

that taxpayer's payments were used to satisfy the tax liability of another.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1973.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.

(a) *General Rule.*—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

(b) *Credits Against Estimated Tax.*—The Secretary or his delegate is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary (or his delegate) to be an overpayment of the income tax for a preceding taxable year.

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

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Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

§ 301.6402-2 *Claims for credit or refund.*

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(b) *Grounds set forth in claim.* (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

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(c) *Form for filing claim.* Claims by the taxpayer for the refunding of overpayments of taxes, interest, penalties, and additions to tax shall be made on Form 843. For special rules applicable to income tax, see § 301.6402-3. For other provisions relating to credits and refunds of taxes other than income tax, see the regulations relating to the particular tax.

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§ 301.6402-3 *Special rules applicable to income tax.*

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(b) A properly executed individual, fiduciary, or corporation income tax return shall, at the election of the taxpayer, constitute a claim for refund or credit within the meaning of section 6402 and section 6511 for the amount of the overpayment disclosed by such return. For purposes of section 6511, such claim shall be considered as filed on the date on which such return is considered as filed, except that if the requirements of § 301.7502-1, relating to timely mailing treated as timely filing, are met the claim shall be considered to be filed on the date of the postmark stamped on the cover in which the return was mailed. An election to treat the return as a claim for refund or credit shall be evidenced by a statement on the return setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the taxable year immediately succeeding the taxable year for which such return is filed. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated income tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated income tax for such year or the installments thereof.

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